Filed 11/26/08 In re S.N. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re S. N., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. R. N., Defendant and Appellant.	G040090 (Super. Ct. No. DP014289) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Carolyn Kirkwood, Judge. Affirmed.

Christy C. Peterson, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

* * *

R.N., the alleged adoptive mother of 11-year-old S.N., appeals from the juvenile court's order denying her standing to participate further in the hearing freeing S.N. for adoption (Welf. & Inst. Code, § 366.26 (.26 hearing)),[1] after R.N. failed to file a modification petition (§ 388) or otherwise present evidence or argument to attain standing as the child's presumed mother. In denying an earlier writ petition filed by R.N., we upheld the juvenile court's order terminating the reunification period, setting the .26 hearing, and denying R.N. presumed mother status on the basis of unclean hands. (*Rosie N. v. Superior Court* (Jan. 31, 2008, G039079) [nonpub. opn.] (*Rosie N.*).) The unclean hands doctrine applied because, after lying about S.N.'s biological parentage, R.N. claimed to be S.N.'s mother via an informal adoption arrangement with S.N.'s birth mother, but R.N. prevented Orange County Social Services Agency (SSA) from contacting the birth mother. We observed R.N. "held the key to unwinding her predicament: she could disclose what she knew about [the birth mother]'s whereabouts anytime." (*Id.* at p. 12.)

Following remittitur, R.N. remained steadfast in refusing SSA any aid in locating S.N.'s birth mother. R.N. received notice and appeared at the .26 hearing, but made no effort to change her status from alleged mother to presumed mother. She claims the juvenile court erred in denying her request to contest SSA's adoption and termination of parental rights recommendations at the hearing. Specifically, she asserts she had a due process right to raise the "benefit exception" (§ 366.26, subd. (c)(1)(B)(i)) as a bar to the court terminating her relationship with S.N., though she had not established she was a natural or presumed parent. She also argues the juvenile court erred in declining to continue the .26 hearing to conduct a psychological evaluation the court had suggested,

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[1] All further unlabeled statutory references are to this code.

and made funding available for, eight months earlier to aid R.N. in obtaining reunification services. As we explain below, we discern no error in the juvenile court's rulings, and we therefore affirm the order.

II

DISCUSSION

R.N. contends that although her parental "status remained alleged at the section 366.26 hearing," she "still retained a fundamental liberty interest in [S.N.]'s care that entitled her to participate in the section 366.26 hearing." R.N. had no such interest. True, *parents* have a fundamental interest in the care, companionship and custody of their children. (*Santosky v. Kramer* (1982) 455 U.S. 745, 758.) "An alleged father," in contrast, "does not have a current interest in a child because his paternity has not yet been established." (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1406.) Consequently, alleged parents are "not entitled to custody, reunification services, or visitation." (*Id.* at p. 1410.) Instead, "[d]ue process for an alleged father requires only that the alleged father be given notice and 'an opportunity to appear and assert a position and attempt to change his paternity status. [Citations.]'" (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760 (*Paul H.*).)

R.N. asserts she was entitled to "litigate the parent-child exception" to adoption and termination of parental rights. (See § 366.26, subd. (c)(1)(B)(i).) Not so. *In re Christopher M.* (2003) 113 Cal.App.4th 155 (*Christopher M.*) rejected the notion an alleged parent is entitled to litigate issues at the .26 hearing besides natural or presumed parenthood. The court explained that the "due process rights of parents whose connection to a child has been established are distinguishable from those of an individual whose connection remains only a possibility." (*Id.* at p. 160.) Relying on *Paul H.*, the

court concluded: "Appellant's right to assert a position did not entitle him to a contested section 366.26 hearing. Unless and until appellant was able to elevate his status to that of a biological or presumed father, the only issues on which he was entitled to assert a position concerned his paternal status and his intent and desires regarding the minor if his paternal status became more than just a potentiality." (*Christopher M.*, *supra*, 113 Cal.App.4th at p. 160.)

R.N. attempts to distinguish *Paul H.* and *Christopher M.* on grounds that her connection with S.N. demonstrated more than the "potentiality" of an alleged biological father. She points to evidence from early in S.N.'s dependency when the child still considered R.N. her "mom," noting also that S.N. had spent the majority of her life in R.N.'s care, and that they shared a common gypsy language and cultural heritage. These factors, of course, are relevant to establishing presumed parentage on the basis one has raised the child as one's own. (Fam. Code, § 7611, subd. (d).) But R.N. declined to seek presumed parent status at the .26 hearing, presumably because she had no intention to cooperate with SSA in locating S.N.'s birth mother to verify S.N. had not been abducted or otherwise enable the birth mother to assert competing parental rights.

As we noted in our earlier opinion denying R.N.'s writ petition, "'"The [unclean hands] doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim." [Citation.]'" (*Rosie N.*, *supra*, at p. 11.)

R.N.'s insistence she had the right to invoke the parent-child benefit exception at the .26 hearing by showing her relationship with S.N. rose to the level of a presumed mother amounts to an end-run around the juvenile court's earlier order, which

we affirmed, precluding such a showing while her hands remained unclean. R.N. has no due process interest in making such a showing in violation of the court's order. She had ample opportunity to establish she was a presumed mother (Fam. Code, § 7611) in a bona fide fashion, including at the .26 hearing. We will not countenance her attempt at that hearing or on appeal to circumvent the juvenile court's unclean hands finding by, in effect, a collateral attack. Simply put, R.N. had no right to participate further in the hearing because she remained an alleged parent who failed to establish presumed mother status at or before the .26 hearing. (*Paul H.*, *supra*; *Christopher M.*, *supra.*)

R.N. argues that as a party to the proceeding she had a statutory right (see § 366.26, subd. (b)) to present evidence at the .26 hearing, including evidence on the benefit exception to adoption and termination of parental rights. Section 366.26, subdivision (b), provides that in addition to the report SSA prepares for the .26 hearing, the juvenile court "shall receive other evidence that the parties may present . . . ." R.N. also relies on a general observation in *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477 that "it is always in the best interests of a minor to have a dependency adjudication based upon all material facts and circumstances and the participation of all interested parties entitled to notice." (*Id.* at pp. 490-491.) As an alleged parent, R.N. received notice of the .26 hearing (§ 294), but that does not mean she had the right to participate further after she made no effort to raise her status to presumed parent.

The flaw in R.N.'s argument that, as a party, she was entitled to present evidence in all phases of the .26 hearing is that only relevant evidence is admissible (Evid. Code, § 350). Having failed to establish she was a biological or presumed parent, R.N. necessarily lacked evidence relevant to establishing an exception to termination of *parental* rights applied. (E.g., § 366.26, subd. (c)(1)(B)(i).) Consequently, the juvenile

court did not abuse its discretion in precluding R.N. from presenting evidence of her nonparental relationship with S.N. Again, to the extent R.N. sought to show her relationship with S.N. amounted to, or approached, that of a presumed parent, R.N. was not entitled to bypass the juvenile court's unclean hands ruling. And to the extent R.N. suggests relationships short of biological or presumed parenthood should receive protection similar to the benefit exception for parental rights (§ 366.26, subd. (c)(1)(B)(i)), that is a legislative rather than judicial question. (See *In re Marriage of Tavares* (2007) 151 Cal.App.4th 620, 628 ["The Legislature declares state public policy, not the courts"].)

Finally, R.N. argues the juvenile court erred in denying her request to continue the .26 hearing so she could receive an Evidence Code section 730 psychological exam. The .26 hearing was held in March 2008. The juvenile court had authorized the exam, and funding, at the disposition hearing in July 2007, *if R.N. requested it*. The court observed at the time that, depending on the outcome of the exam, a modification petition (§ 388) might prompt the court to change its order denying reunification services. But R.N. failed to request the exam until eight months later at the .26 hearing.

We review denial of a continuance for abuse of discretion. (§ 352, subd. (a); *In re Elijah V.* (2005) 127 Cal.App.4th 576, 585.) The juvenile court did not abuse its discretion. We observed in our earlier opinion denying R.N.'s writ petition that the exam "offered potential bases for a change in the court's order" denying reunification services. (*Rosie N.*, *supra*, p. 12.) "For instance, the evaluation might demonstrate [R.N.]'s bond with [S.N.] was closer than it appeared or establish some other benefit from reunification services outweighing the court's unclean hands finding." (*Id.* at

pp. 12-13.) But even though the .26 hearing was continued several times following remittitur of our opinion, R.N. failed to request the exam until the .26 hearing was actually underway. The juvenile court could reasonably conclude the request was untimely.

R.N. explains that her jailors in Los Angeles County declined to transport her, despite the juvenile court's transportation orders, while she awaited trial on burglary charges. But R.N. does not suggest she was prevented access to the mail or telephone to make her request for an evaluation in the eight months preceding the hearing.

Additionally, the juvenile court could reasonably conclude granting a continuance was not in S.N.'s best interests because the purpose of the exam was to evaluate reunification services for R.N. and there remained, at most, one more month in the maximum 18-month reunification period. (See § 361.5, subd. (a)(3).) The court could conclude a continuance to conduct the exam, even if completed in a month, would not remedy R.N.'s failure to obtain presumed mother status or alter S.N.'s decision not to see her. In other words, there was no evidence that conducting the exam would cause R.N. to cooperate in locating the birth mother, seek and obtain presumed mother status, and successfully assert the parent-child benefit exception. The odds of any of these eventualities occurring, let alone all of them, is beyond speculative. Consequently, the trial court did not abuse its discretion in denying R.N.'s belated request for a continuance to conduct the exam.

III

DISPOSITION

The order of the juvenile court terminating parental rights and freeing S.N. for adoption is affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.